IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 1254 OF 2006

Jagannath Singh]
Age : 60 years, Occ: Retired]
R/at : A/4 & 202, Subharambh]
Complex, Tikujiniwadi Road]
Manpada, Thane (West)]..Petitioner
versus
1. Dr. Shri Ajay Upadhyay]
Age : 32 years, Occ: Business]
R/at : 55/63, Ganga Nivas,]
2nd floor, Kalbadevi Road,]
Mumbai 400 002]
2. The State of Maharashtra]
(at the instance of Sr. P. I.]
Narpoli Police Station,]
Dist : Thane]..Respondents

Mr. K. S. Patil, for the Petitioner.

Mrs. S. D. Shinde, APP for the Respondents - State.

CORAM : D. G. DESHPANDE, &
S. A. BOBDE,JJ.

DATE : 14TH JULY, 2006

ORAL JUDGMENT (Per. D. G. Deshpande, J.) :

1. Heard learned counsel for the petitioner and the learned APP for the State.

2. The Respondent No.1 has filed a Criminal Complaint before the JMFC, Bhiwandi, against the

accused for breach of trust and other offences under Sections 403, 504, 406, 409, 506 II r/w. 511 and 120-B of the I.P.C. According to the Petitioner - Accused he has no role to play in the so-called offence. He has no concern with the business of his son - the accused No.2, who is not respondent in the petition, and, therefore, FIR which is registered against him should be quashed.

3. The petitioner has stated in the petition that after the complaint was filed by the respondent No.1, Magistrate ordered investigation under Section 156 of the Criminal Procedure Code (for short "Code") and the police have registered M.C.R. No. 2/2005 against the petitioner and his son. The son of the petitioner was arrested and now the police want to arrest the petitioner. Counsel for the petitioner contended that till the petition is decided, protection should be granted to him from arrest.

4. We heard the matter at length on this last issue because many matters come before us in similar background, that is, person filing a complaint before the Magistrate, Magistrate passing order

under Section 156(3) of the Code and police registering FIR and then wanting to arrest the accused against whom the FIR is registered by them. In all such petitions, filed by the accused - petitioners, the grievance is that merely because FIR is registered in such circumstances, arrest is not a must and some protection has to be given to the accused from their arrest. We have to therefore consider the relevant provisions of Criminal Procedure code.

5. Section 156 is in Chapter XII. The heading of the Chapter is "**Information to the Police and their Powers to Investigate".** Section 154 is about "Information in cognizable cases" and Section 155 is about **"Information as to non-cognizable cases and investigation of such cases"** and Section 156 is about **"Police Officer's power to investigate cognizable cases."** Sub Section 3 of Section 156 states that **"Any Magistrate empowered under Section 190 may order such an investigation as above mentioned."**.

6. Section 190 which is referred in Sub Section (3) of Section 156 is in Chapter XIV. Title of

Section 190 is **"Cognizance of offences by Magistrate".** Section 190 reads as follows:

> **90. Cognizance of offences by Magistrates. (1) Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under sub-section (2), may take cognizance of any offence -**
>
> **(a) upon receiving a complaint of facts which constitute such offence;**
>
> **(b) upon a police report of such facts;**
>
> **(c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.**
>
> **(2) The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under sub-section (1) of such offence as are within his competence to inquire into or try."**

It is therefore clear that the Magistrate is empowered to take cognizance of any offence, upon receiving a complaint of facts which constitutes such offence. It is in this background that the Magistrate may order an investigation by the police under Section 156 in cognizable cases.

7. The powers of the police to investigate into cognizable cases flows from two circumstances, viz. the police on their own accord i.e. without the

order of the Magistrate may investigate any cognizable case, or, secondly they may investigate the cognizable case upon the order of the Magistrate.

8. The question is whether arrest of persons should necessarily, immediately and invariably follow the registration of the FIR or crime by the police when the investigation is ordered by the Magistrate while exercising powers under Section 190 and under Section 156(3).

9. So far as powers to arrest of person is concerned, they are included in Chapter V of the Code. Section 41 lays down that when **any police officer may without an order from a Magistrate and without warrant, arrest any person.** Section 41(1)(a) reads as under:

> **41. When police may arrest without warrant.**
>
> **(1) Any police officer may without an order from a Magistrate and without warrant, arrest any person -**
>
> **(a) who has been concerned in any cognizable offence, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having**

been so concerned, or"

10. Chapter XII as referred earlier is about **"Information to the Police and their powers to investigate".** Procedure for investigation is given in Section 156. In the same Chapter Section 157 sub section (1) states that **"If, from information received or otherwise, an officer-in-charge of a police station has reason to suspect the commission of an offence which he is empowered under section 156 to investigate, he shall forthwith send a report of the same to a Magistrate empowered .... and if necessary to take measures for the discovery and arrest of the offender."** Section 169 states that "**If upon an investigation, it appears to the officer-in-charge of the police station that there is no sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused to a Magistrate, such officer shall, if such person is in custody, release him on his executing a bond, with or without sureties..."**

11. Section 170 of Code provides that **"If, upon an investigation, it appears to the officer-in-charge of the police station that there**

is sufficient evidence or reasonable ground as aforesaid, such officer shall forward the accused under custody to a Magistrate empowered to take cognizance of the offence upon police report..... or, if the offence is bailable and the accused is able to give security, shall take security from him for his appearance before the Magistrate......."

12. Section 167 provides that **"Whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by section 57, and there are grounds for believing that the accusation or information is well-founded, ...then officer, shall forthwith transmit to the nearest Judicial Magistrate a copy of the entries of the diary and .... also forward the accused to such Magistrate".**

13. From the aforesaid provisions, it will be clear that though the powers of arrest are given to the police in cognizable offence, it is not necessary that in each case they will exercise such powers and arrest the accused. They may or may not arrest the accused depending upon the facts and

circumstances available. Mere registration of FIR may not in the opinion of the police be sufficient to arrest the accused. They may require further investigation and then if the investigation reveal something to implicate the accused in a cognizable case then they may arrest the accused.

14. It is therefore clear for us that when a Magistrate directs an investigation it is for the purpose of enabling the police to carry on investigation in cognizable case, and from section 154 and other sections onwards, it is clear that the police get powers to investigate after recording of the FIR. A short question, before us, and a limited question is whether arrest should immediately follow when the Magistrate orders investigation under Section 156(3) of the Code and when police registers FIR. In our opinion, arrest should depend upon the facts and circumstances of the case and should not be resorted to invariably by the police in every such cases.

15. There can be cases where the complaints are filed on flimsy grounds or after inordinate delay or complaints involve civil as well as criminal

disputes or complaints against persons residing in other States or other part of the same State, who have no prior intimation or knowledge of filing such complaint against them and similarly there could be scores of other cases where immediate arrest of the accused merely upon registration of FIR would not be justified. Therefore, in our opinion, it is necessary to give certain guide-lines to the police, in this regard.

16. We repeat here again that we are dealing with the cases initiated before the Magistrate by filing a complaint where Magistrate orders investigation under Section 156(3) of the Code. Therefore, in those cases only where the police register FIR and start investigation, if at all the police desire to arrest the accused they should seek orders from the Magistrate in that regard making out a case for justification of immediate arrest. It may not be necessary for the Magistrate to give notice to the accused because that may frustrate the object of arrest but seeking directions from the Magistrate before arresting the accused, appears to us, the only method of protecting the interest of persons who may have been innocent, who may have no

concern with the allegations, who may have no notice of the allegations where the allegations are of either purely civil type or mixed question of civil and criminal liability or where there is inordinate delay in filing complaint though it may be within limitation. We cannot envisage all such circumstances and it is not necessary to do so. Suffice it to say that if in complaint case Magistrate passes order under Section 156(3) and police register a FIR, then before arresting the accused, the police shall approach the Magistrate and take his orders in that regard unless in a given particular case the police apprehend that these steps will frustrate the proceedings, the investigation and the accused is dangerous or is likely to abscond.

17. In view of this, we grant interim protection to the petitioner as prayed in prayer clause (c) till the police approaches the Magistrate and seeks his orders regarding the arrest of the accused.

18. Copy of this order be circulated to all the Magistrates and Metropolitan Magistrates, who while passing Order under Section 156 give necessary

directions to the concerned police with reference to the aforesaid guidelines.

19. Writ Petition disposed of.

(D.G. DESHPANDE)

(S.A. BOBDE)